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Evidence--Use of Truth Serum Statements in Substantiating the Testimony of an Impeached Witness

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migratory inclinations. So long as the minimum requirements of due process are met, the judgments of a court of equity in the interests of children of divorced parents should not be defeated by rules of procedure.¹⁵

Still, in fairness to either of the parents, it seems that something more should be required than directing notice to the last known address by ordinary mail. Cammack, J., isolated the problem in the principal case when he concurred with the majority because of the clear meaning of the rule but questioned the adequacy of that rule in cases involving a request for substantive relief. He suggested that the rule might be amended to provide that:

[I]f a motion is for an order or judgment granting a claim for substantive relief in the nature of a judgment in personam, which relief is in addition to that sought in the original complaint in the action or granted by a previous order or judgment in the action, and the opposing party is not represented by an attorney, notice of the motion should be served by *registered* mail.¹⁶

This recommendation is heartily endorsed with one reservation. It is felt that the words "in the nature of a judgment in personam" should be omitted. Thus broadened, the recommendation would extend the use of registered mail to motions for an order or judgment granting a claim for *any* substantive relief not previously requested in the action. In divorce cases, for example, this would bring motions to modify the child custody provisions of the judgment within the registered mail category. Such a modification of the present rule would not only increase the probability of actual notice, but would also tend to obviate the likelihood of service by gesture.

Robert E. Adams

EVIDENCE—USE OF TRUTH SERUM STATEMENTS IN SUBSTANTIATING THE TESTIMONY OF AN IMPEACHED WITNESS—The defendant was convicted of sodomy and statutory rape committed on a fifteen year old girl. At the trial the girl testified in detail concerning the circumstances of the offenses. Following her testimony the defense then impeached her statements by introducing her letters and affidavit retracting all the allegations of sexual misconduct. In an effort to rebuild their witness's testimony the prosecution called a psychiatrist who testified that in his opinion the girl was telling the truth when making the charges.

¹⁵ There are few if any inflexible rules of procedure in this kind of case. *Shallcross v. Shallcross*, 135 Ky. 418, 122 S.W. 223 (1909).

¹⁶ *Benson v. Benson*, *supra* note 13 (concurring opinion).

The psychiatrist's opinion was formed on the basis of a complete clinical examination that included not only psychological and personal tests but a sodium pentothal ("truth serum") test. Also the prosecution played to the jury a tape recording of the girl's statements made while under the influence of sodium pentothal. On appeal the prosecution argued for the admissibility of both the psychiatrist's opinion testimony and the tape recording, contending that under general principles of evidence prior consistent statements are admissible to rehabilitate the testimony of an impeached witness if they are made when there was no motive to distort.¹ Thus, because sodium pentothal releases the witness's inhibitions and any motive he may have to distort the truth, the testimony has sufficient guaranty of truth to be admissible under the general rule. However the Court of Appeals rejected the prosecution's arguments and reversed the conviction. *Held*: The admission of a tape recording of statements made by a material witness while under the influence of sodium penothal is prejudicial error, even though not admitted as substantive evidence but only to rehabilitate the impeached witness's testimony. *Lindsey v. U. S.*, 237 F. 2d 893 (1956).

The court agreed that sodium pentothal did release the inhibitions and possibly remove the motive to distort the truth but there was still not a sufficient guaranty of truth to warrant admission because released inhibitions also give the subject's imagination full sway "and stimulate unrepressed expression not only of fact but of fancy and suggestion as well".² One writer has reached substantially the same conclusion and has suggested that "... truthful answers are not always forthcoming when the scopolamine test is applied. Thus any information which one received in a criminal interrogation must be carefully scrutinized to see if supporting physical evidence can be obtained".³

¹ McCormick, *Evidence* at 374 (1954):

"If the offering party has testified the statement may be offered, not to prove the facts stated therein, but as a prior consistent statement to support his credibility, escaping the rule against such form of support by reason of the foundation showing the unique trustworthiness of this type of prior statement."

Wigmore, *Evidence*, Sec. 1126 (3rd ed. 1940). This is also the Kentucky rule. See *Eubank v. Commonwealth*, 210 Ky. 150, 275 S.W. 630, 633 (1925):

"Where, however, a witness has been assailed on the ground that his story is a recent fabrication, or that he has some motive for testifying falsely, proof that he gave a similar account of the matter when the motive did not exist, before the effect of such an account could be foreseen, or when motive or interest would have induced a different statement, is admissible."

² *Lindsey v. U.S.*, 237 F. 2d 893, 896 (1956), referring to 62 Yale L.J. 315, 319 (1953).

³ Muehlberger, *Interrogation Under Drug Influence*, 42 *Journal of Criminal Law, Criminology, and Police Science* 513, 519.

Because the effect of "truth serum" was so critical in the decision a medical description and analysis of the drug and its results are necessary for a full understanding of the case. Several different types of drugs have been used as "truth serums", e.g. scopolamine,⁴ or more often a barbiturate such as sodium pentothal⁵ or sodium amytal,⁶ because they are non-toxic and have fewer side effects.⁷ The depressant effect of the drug and the resultant release of inhibitions was explained in a combined study made by two members of Yale University Law School faculty and two members of the Medical School faculty as follows:

They act as a central nervous system depressant, primarily on the cerebral cortex—the highest level of the nervous system—and on the diencephalon or "between-brain", and their pathways. . . . The particular type of behavior manifested under the influence of amytal is a complex resultant of the interaction of the personality of the subject, his specific physiological and bio-chemical reaction to it, and what is happening to him at the time.⁸

The result of the depressant on the central nervous system is to release the subject's inhibitions making it less likely that he will consciously suppress or distort the facts. But this is not always a certainty and as the article points out any one particular subject's reaction may vary considerably from the theoretical norm, depending on his personality, physical reaction, and what is happening to him. In spite of the many variables involved in any conclusion based on truth serum tests, such evidence should probably be allowed to a certain extent in modern day court proceedings. The problem is to determine when and to what extent truth serum evidence should be admissible.

The principal case points up the two occasions in a trial proceeding in which counsel may attempt to introduce truth serum evidence. First, a transcript of the questions and answers or a tape recording of the experiments conducted on the subject while under the influence of the drug may be read or played before the jury. Second, opinion testimony of a qualified expert, normally a psychiatrist, predicated in

⁴ Dorland, *The American Illustrated Medical Dictionary* (20th ed. 1946) defines Scopolamine as follows: "A mydriatic alkaloid, the scopoline ester of tropic acid, from the root of . . . solanaceous plants. It is a poisonous nerve depressant, mydriatic and hypnotic, and is used in mania, delirium, insomnia, alcoholic tremor and marked sexual excitement."

⁵ *Id.*: "Pentothal Sodium— . . . used as an intravenous anesthetic and hypnotic."

⁶ *Blakiston's New Gould Medical Dictionary* (1st ed. 1949) defines Sodium Amytal as follows: "[A] white, hygroscopic, granular powder, soluble in water or alcohol. . . . It is used as a sedative and hypnotic in the control of insomnia and preliminary to surgical anesthesia, and as an anti-convulsant."

⁷ See 62 Yale L.J. 315 (1953).

⁸ *Id.* at 317.

whole or in part on a sodium pentothal or other truth serum interview may be sought to be admitted. Not only do these two uses of this type of interview present difficulties but there is an area of related and incidental problems, such as the matter of referring to the drug used as a "truth serum" and allowing inferences to be drawn from the failure of a witness to submit to the tests. The probative value of evidence in the first two situations and prejudicial effect of the latter will be discussed in the remainder of this comment.

Because of the nature of the drug itself a tape recording or any other method of getting the experiment directly before the jury should be inadmissible. These tests only have validity if they are interpreted by an expert in the field and even then there is considerable chance for error. A majority of cases seem to have agreed with this and generally have not recognized the reliability of such tests. In fact many courts are so skeptical as to question the admissibility of expert testimony based on drug tests.⁹

Based on a number of experiments with these serums it was stated in one article,

Rarely could the information obtained under the influence of the drug be interpreted directly in the light of its manifest content. It was useful only when integrated into the fabric of the patient's conflictual tendencies and anxieties. The verbalized material was valued neither as representative of proven deeds nor as demonstrated facts, but simply as psychological data—meaningful and helpful only in the context of the clinician's knowledge of the patient.¹⁰

The lay jurors ordinarily do not have sufficient understanding of the tests to allow them to properly interpret the results. The principal case suggested that the situation could be improved if the jurors were not limited to the use of only one sense, merely *hearing* the tests, but

⁹ See *People v. McCracken*, 39 Cal. 2d 336, 246 P. 2d 913 (1952). The trial court did not abuse its discretion by refusing to allow the defendant to be subjected to "truth drugs" while on the witness stand. *State v. Lindemuth*, 56 N.M. 257, 243 P. 2d 325 (1952); *People v. Cullen*, 37 Cal. 2d 614, 234 P. 2d 1 (1951). It is not a prejudicial error for a trial court to refuse admission of the opinion of a psychiatrist based on sodium pentothal tests. The statements would be "hearsay, self-serving, and conjectural," and it is doubtful if they would be admissible; *Henderson v. State*, 94 Okl. Cr. 45, 230 P. 2d 495 (1951); *People v. McNickol*, 100 Cal. App. 2d 554, 224 P. 2d 21 (1950); *Orange v. Commonwealth*, 191 West Va. 423, 61 SE 2d 267 (1950); also see annotation, 23 ALR 2d 1306, 1310 (1952).

The New York cases have been inconsistent in this matter. *People v. Esposito*, 287 N.Y. 389, 39 N.E. 2d 925 (1942), allowed the admission of truth serum evidence. But ten years later, *People v. Ford*, 304 N.Y. 679, 107 NE 2d 595 (1952), held that although the accused's mental ability for premeditation is in issue the psychiatrist could not testify that in his opinion, predicated on sodium amyl tests, the accused was not mentally capable of premeditation. The dissent felt this was reversible error because this was one of the "methods set up objectively by the medical profession for the proper determination of such claims", that is, claims of mental derangement. 107 NE 2d 595 at 596.

¹⁰ *Supra* note 7 at 318.

were allowed to see them as well. However, even if they were to see as well as hear the conduct of such an examination it would not remove a more fundamental problem, their own lack of knowledge and background which severely limits or prevents a correct interpretation of what they observed. It is doubtful if the lay juror is any more capable of forming a correct opinion based on the recording than he would be of diagnosing the disease in a workmen's compensation case or performing an autopsy to determine cause of death. If this is true and direct statements made under the influence of the drug should be inadmissible, may the courts still allow use of expert opinion testimony predicated on truth serum examinations?

A psychiatrist may qualify as any other expert and thus be allowed to venture his opinion within the purview of his expertness.¹¹ Testimony of a psychiatrist is particularly helpful in cases involving sex crimes where very often the testimony of a single prosecuting witness will be the only testimony of an eye witness to the sex act. The credibility of this critically important witness becomes extremely valuable in a decision of the case. Because of this the American Bar Association's Committee on the Improvement of the Law of Evidence has stated,

The penalties for sex crimes are very severe,—justly so in most cases. But the very severity of the penalty calls for special procedural precautions. . . . We recommend that in all charges of sex offenses, the complaining witness be required to be examined before trial by competent psychiatrists for the purpose of ascertaining her probable credibility, the report to be presented in evidence.¹²

The opinion testimony of a psychiatrist also becomes important to establish any mental derangement or the ability to premeditate a crime.

Examinations conducted by a competent psychiatrist in which "truth serums" are used are not open to the same objections as the use of tape recordings of them before a jury. This is because the expert, aware of the drug and its effect, knows that the subject's statements cannot be taken literally, that he is very likely to tell fantasy as well as truth, and is extremely susceptible to suggestion. These factors should be taken into account by one who has had experience with the examinations, and are more likely to be placed in their proper perspective in weighing the value of the witness's statements and in forming a conclusion as to his "truth and veracity".

There is a third area of related problems connected with truth

¹¹ See McCormick, *supra* note 1, on expert testimony beginning on page 28.

¹² 1938-39 Report of the American Bar Association's Committee on the Improvement of the Law of Evidence, cited in 3 Wigmore, Sec. 924(a), at 466.

serum testimony. One, occurring in jurisdictions admitting truth serum evidence, is Should use of the term, "truth serum", be allowed before the court and jury? These words have gained popular recognition,¹³ but as one writer has suggested, "The drug is not a serum and as subsequent investigation disclosed, it does not invariably lead to truth".¹⁴ No doubt subtle use of the term before the jury could have a very misleading effect in their minds as to the reliability of the tests. As a result it probably could be prejudicial error in most criminal proceedings to use the term and certainly should be if no clarifying definition is given it.

Another related problem, occurring when truth serum testimony is not admitted, is that of commenting on and allowing inferences from a failure to take the tests. In a recent New York case,¹⁵ the prosecutor commented adversely and at length on the defendant's refusal to take a truth serum test. The New York Court of Appeals held this to constitute reversible error because it had violated the defendant's constitutional protection against compulsory self-incrimination. This represents the preferable solution because to allow inferences from a person's exercise of the privilege would not only be an anomalous situation but would render it ineffectual.¹⁶

Conclusion

Although questions and answers or direct statements made by a person under the influence of drugs should be inadmissible in evidence, there is good reason to allow the testimony of an expert, normally a psychiatrist, as to his opinion of a person's credibility based on "narcoanalysis". Medical science seems to have advanced to the extent that there is an awareness of the weaknesses as well as the strengths of this type of test; that a person while under the influence of the truth serum may relate untruths, fantasy, and is often extremely susceptible to suggestion. But the weaknesses in the use of the test would not prevent the testing results from having a considerable amount of validity and usefulness if conducted and related to the court by one who is experienced in giving them and who normally would have an awareness that the truth serum test is only one factor to consider in

¹³ Webster's New International Dictionary (2d ed.): "Truth Serum—a drug administered to induce temporary truthfulness."

¹⁴ Muehlberger, *supra* note 3 at 514-515.

making a final evaluation of the basic personality traits and credibility

¹⁵ *People v. Draper*, 304 N.Y. 799, 109 N.E. 2d 342 (1952).

¹⁶ For a general discussion of inferences from a person's claim of a privilege see 8 Wigmore Sec. 2272 (3rd ed. 1940).

of the witness. This is particularly true since the expert witness will be subject to cross examination as to the methods and validity of the testing process.

Wayne J. Carroll

ILLEGAL SEARCH AND SEIZURE—POWER OF A FEDERAL COURT TO ENJOIN A FEDERAL AGENT FROM TESTIFYING IN A STATE COURT—The United States Constitution prohibits illegal searches and seizures,¹ but makes no mention of the admissibility of evidence so obtained before a court. Until this century both federal and state courts accepted the common law rule that, with few exceptions, evidence otherwise admissible need not be excluded because it is illegally obtained.² The specific rule that in the field of searches and seizures evidence should be excluded if it has been illegally seized was first laid down by the Supreme Court of the United States some seventy years ago.³ But it was not until 1914 that the rule was clearly enunciated by that Court in *Weeks v. United States*⁴ in which the Court held that evidence illegally obtained by federal officials in violation of the Fourth Amendment is inadmissible in a federal prosecution.⁵ However, generally, the Supreme Court has not seen fit to

¹ U.S. Const., Amend. 4:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

² 8 Wigmore, Evidence Secs. 2183, 2184 (3d ed. 1940). The rationalization for the rule is that to exclude such evidence would only be to free the guilty, i.e., one malefactor should not claim the right to escape prosecution by reason of the illegal acts of another. Also, if the evidence is relevant, any argument as to the illegality of obtaining it is merely a "collateral issue."

³ *Boyd v. United States*, 116 U.S. 616 (1886).

⁴ 232 U.S. 383 (1914). The common law power of courts to develop rules for the admissibility of evidence is a well recognized judicial function.

⁵ *Id.* at 393.

"If letters and private documents can be thus taken and held and used as evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

For a criticism of this rule see 8 Wigmore, Evidence, Sec. 2184 at 40 (3d ed. 1940) in which he states,

"The natural way to do justice here would be to enforce the healthy principle of the Fourth Amendment directly, i.e. by sending for the high-handed, over-zealous marshal who had made a search without a warrant imposing a thirty-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal."

As a reply to this, it should be noted that prosecutions of the "over-zealous marshal" have proven to be ineffective, as have civil actions against him.